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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of MARGARET and GRANT PALIN.	B146259 (Los Angeles County Super. Ct. No. BD281921)
MARGARET PALIN, Respondent, v. GRANT PALIN, Appellant.	

APPEAL from a judgment of the Los Angeles County Superior Court. Timothy Murphy, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Modified and affirmed.

Goldman & Kagon Law Corp., Jared Laskin and Terry McNiff for Defendant and Appellant.

Law Offices of David S. Karton and David S. Karton; Greines, Martin, Stein & Richland and Robert A. Olson for Petitioner and Respondent.

In this dissolution of marriage proceeding, defendant and appellant Grant Palin (hereinafter Husband) appeals from the judgment, challenging the division of employee stock options, the award of further spousal and child support based on his annual bonus from employment, the failure to award him reimbursement for mortgage payments, and the failure to charge plaintiff and respondent (hereinafter Wife) with her post-separation withdrawals of money from a community account. Husband also seeks reversal of the judgment on the ground of the "appearance of bias," claiming the trial judge was "hostile and antagonistic" towards Husband.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married in 1981; two daughters were born in 1988 and 1990; the parties separated on June 15, 1998.[1] From 1993 through at least the trial herein, in 2000, Husband was employed as a vice-president in the corporate alliance division of The Walt Disney Company; in 1998, his net disposable income was about $11,500 per month. Prior to the birth of their first child and while the parties lived on the east coast, Wife had been employed as a foreign exchange trader and had earned about $100,000 per year; she left her job to become a full-time parent in 1988.

Although Husband moved out of the family residence and into an apartment about the time they separated in mid-1998, Wife and the children continued to reside in the family residence until Wife and children moved to New Jersey in late August 1999.[2] The family residence was sold in September 1999, leaving proceeds of about $190,000.

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[1] Although the date of separation was a contested issue at trial, the court, in its lengthy statement of decision, found the date of separation to be June 15, 1998. Inasmuch as appellant does not challenge the sufficiency of the evidence in support of this factual finding, we set out this factual finding from the statement of decision, as well as others not challenged by appellant.

[2] The parties were married on the east coast and both of them had family still residing there.

After the parties separated, but before Wife moved to New Jersey, Husband placed $1550 of his earnings each week into an account for Wife to pay the mortgage and bills in connection with the family residence and for support for Wife and children. From September 1999 to mid-December 1999, Husband reduced the amount he gave them for support to $892 per week. After hearing in December 1999, the court issued a temporary support order, (reduced to a formal signed order dated and filed on January 6, 2000), requiring Husband to pay child support of $2,311 per month and spousal support of $1,988 per month; for any bonus he received, he was to pay additional child support of 11.7 percent of the bonus per child, and additional spousal support of 26.6 percent of the bonus. The DissoMaster used by the trial court at the December 1999 hearing listed Husband's wage and salary income as $13,708 per month. At trial, Husband admitted that his income for the year 2000 was about $175,000, which did not include a bonus, paid by Disney once a year; Husband received a bonus of $35,000 in January 1999, for the period October 1997 to September 1998.

In October 1999, wife obtained employment in New Jersey as a financial services associate with The Prudential Insurance Company, earning about $30,000 per year. The trial court rejected Husband's claim that Wife could have found work in California for $50,000 to $100,000 per year. The court found instead that she acted reasonably and returned promptly to the job market; during the 12 years she was out of the job market, the area in which she had been employed changed for the worse and would not provide the amount of income she had previously earned.

As an employment benefit with Disney, Husband was also offered Disney Non-Qualified Stock Options in October 1995 and in November 1996 (referred to as Block 1 and Block 2, respectively). Both grants of stock options were part of Disney's 1990 Stock Incentive Plan (1990 Plan). In October 1995 (Block 1) and November 1996 (Block 2), Husband received letters signed by Disney's chairman and chief executive officer, Michael Eisner, informing him of the respective stock option offers.

The stock options in Block 1 were divided into five equal portions, with each portion becoming available for exercise in September of each year from 1996 to 2000; the term of the option was 10 years, expiring in September 2005; subject to his continued employment with Disney, Husband could exercise the options by paying the exercise price and applicable taxes. The stock options in Block 2 were also divided into five portions, with each portion becoming available for exercise in September of each year from 1997 to 2001.[3] As best as we can determine from the instant record, as of August 1998, Husband had exercised his option only as to a portion of the vested shares in Block 1; sometime prior to the time the parties separated, Husband had sold a portion of the shares in Block 1 to purchase a motorcycle, to replace one he had totaled in an accident.

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[3] "The date of exercisability of the option is the date the stock can be purchased. The vesting date is the date the stock purchased pursuant to the option can be received. An option may be exercised, but the stock still subject to forfeiture if the employee is terminated prior to its vesting." (*In re Marriage of Walker* (1989) 216 Cal.App.3d 644, 647, fn. 1.)

As we interpret the record, (essentially the letters by Michael Eisner offering Husband the options), a portion of the shares vests in each of five years as to each of the 1995 and 1996 stock option grants. In other words, at the time of the September 22, 2000, judgment herein, four-fifths of the shares in Block 1 were vested, with the remaining portion vesting on September 26, 2000. As to Block 2, half of the shares were vested at the time of the judgment, with the remaining shares vesting on September 30, 2000, and September 30, 2001. The letters also provided that, once vested, the right to purchase the vested shares continued up to, and expired on, September 26, 2005 (Block 1) and September 30, 2006 (Block 2), provided that Husband's employment with Disney continued. The letters also stated that "If your employment should cease prior to your grant expiring, you should familiarize yourself with the various plan provisions that affect your right to exercise after termination. In general, you will have the right to exercise any shares that are vested or will vest during the three months following your termination date. Your right to exercise these shares expires at the end of this three month period."

In his trial brief, Husband characterized the schedule set out in the Eisner letters as creating a "sequential vesting" scheme and that sequentially vesting stock options should be apportioned more as separate property than as community property, or at least that the shares vesting after separation are separate property of Husband.

At trial, the parties stipulated that the stock options "shall be divided equally to the extent that [they] were earned to the date of separation, but the parties differ completely on what the calculation is," and the court "will determine what that is later . . . ."

The Eisner letters stated that, based on his recommendation, the stock options were granted by the Compensation Committee of the Board of Directors; the bottom of the second pages of the letters contained a place for Husband to sign the letters; the letters stated further that "Your signature acknowledges receipt of a copy of the 1990 Plan and Rules and evidences your agreement to be bound by all the terms and provisions of this Agreement, the Plan and the Rules."

At trial, Husband called no Disney employee or officer to testify regarding Disney's intent in granting him the stock options.[4] The complete 1990 Plan and Rules was not admitted into evidence; only two pages of the 1990 Plan was admitted into evidence (as Exhibit 114). The portion of the 1990 Plan admitted into evidence provided in pertinent part: "The purposes of the 1990 Plan are to provide long-term incentives and rewards to employees of the Company and its subsidiaries, to assist the Company in attracting and retaining employees with experience and/or ability on a basis competitive with industry practices and to associate the interests of such employees with those of the Company's stockholders."

At trial, Husband offered the testimony of a former Disney vice-president of corporate alliances, Michael Widman, who left Disney in February 1997. Widman

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[4] At trial, Husband took the position that Eisner's letters constituted the stock option agreements, despite the fact that the letters themselves referred to the 1990 Plan and Rules. Sustaining objections on hearsay grounds, the trial court refused to admit the Eisner letters as evidence of Disney's intent or purpose in granting Husband the stock options. Husband made an offer of proof, which was rejected at that time, that he did not subpoena any Disney employees because he believed it would be detrimental to his career. Later in the trial, in connection with the issue of attorney fees, Husband testified that it was a conscious decision not to subpoena any Disney employee on the issue of the stock options because he believed it would be detrimental to his career.

testified that it was Disney's stock option policy to grant employees a future ownership interest in the company; he denied that the options were granted as both a reward and an incentive, although he admitted that if Husband had not been performing well at his job in the past, he would not have been offered the stock options.

Widman admitted that he did not draft Disney's 1990 Plan, he did not read the minutes of the board meeting when the plan was adopted, and it was Disney's Human Resources Department that determined the terms and conditions of the stock options. Widman also admitted that he was not involved in the decision to grant Husband stock options; Human Resources employee Robin Coleman and Sanford Litvack were involved in making the decisions as to the offers of stock options to Husband; he never reviewed Husband's Human Resources file; that file could reveal other reasons, other than providing an incentive for future performance, for the granting of Husband's stock options. Widman did not know whether one of the purposes of the 1990 Plan was to reward past performance; he only knew what the Disney policy was, as he understood it.

After trial, and in September 2000, a judgment and lengthy statement of decision were filed. According to the statement of decision, the court determined that the above stock options granted to Husband in 1995 and 1996 were community property and divided them equally between Husband and Wife. The court found that Husband's "presentation of this issue was not sufficient to allow the court to rule in [his] favor even if the court were persuaded by [his] arguments as to the validity of an allocation [between community and separate property] based on a 'sequential' vesting. . . . [¶] . . . [Husband] deliberately elected not to bring in expert witnesses to present admissible evidence or testimony to support his various positions. Rather, [he] chose to rely on an article by George Norton or similar arguments and/or his own testimony.[5] . . . [S]uch an article is

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[5] Husband had submitted with his trial briefs copies of an article by George Norton titled *Apportionment of Stock Options (Part One)* which appeared in the *Family Law News*, volume 21, number 3, in Fall 1988 and in a subsequent issue, where the placement of the charts included in the article was corrected.

inadmissible hearsay, since it was offered without proper foundation (e.g., there was no qualification of the author as an expert witness). . . . No exceptions to the hearsay rule were applicable to permit the court to accept the article as evidence. Since no foundation was laid to establish the expert qualifications of the author of the article, the article was inadmissible speculation and opinion."

The court also concluded that Husband himself was not qualified to explain his legal theory. "Thus, his arguments were inadmissible opinion. [¶] As such, no competent evidence was presented to explain the 'sequential' theory argued by [Husband]. [¶] [Husband] also failed to show the specific reasons he received the stock options. . . . A vague, amorphous platitude will not suffice. Among other deficiencies in [his] presentation, no one from Disney testified as to the specific reasons the options were granted to [him]; no one from Disney testified as to the content of [his] compensation and/or other employment files (if any). Therefore, [Husband] failed to provide evidence which would have permitted the court to choose the appropriate theory from the various stock option cases cited by [Husband]. [Citations.] Again, the court agreed with [Wife's] objection to [Husband] testifying as his own expert to explain the legal significance of the grants and/or the vesting of the subject options."

With respect to the Eisner letters, which were admitted for only a limited purpose, the court explained that they "were inadmissible hearsay to explain the reason for the granting of the options. The letters did not constitute a conveyance or interest which was sufficiently complete so as to explain fully or satisfactorily the reasons for the grant of stock options to [Husband]. Further, the letters were not sufficient to be treated as actual documents of conveyance (like a deed or a will). Rather, they were essentially transmittal letters, and, as such, inadmissible hearsay for the purpose of explaining the reasons for the grants of stock options to [Husband]. It should be noted that the court authenticated both letters over [Wife's] strenuous objections that, among other things, the letters were not originals; . . . that the only evidence regarding the signature of the purported author of the letters was from Mr. Widman who opined that the author [Eisner]

probably did not write or actually sign the letters. . . . [¶] [Husband's] argument as to vesting [see fn. 3, *ante*] is simply not evidence and the court cannot properly consider or apply the theory without competent evidence. . . . Mr. Widman's testimony was clearly not persuasive. Among other reasons for discounting his testimony, he was not part of the compensation committee and did not have personal knowledge as to why the plan was in place; he had very limited, if any, personal knowledge of the reason the grants were given specifically to [Husband]; and, lastly, his own testimony regarding the 1996 grant [Block 2] clearly contradicted the impression he was trying to make."

The statement of decision continued: "[Husband's] argument, if applied, would give little or no value to the community effort which preceded both grants; it would have given substantially all of the benefit to that which occurred after date of separation. This approach would ignore the presumption that assets acquired during the marriage are community property (i.e., both grants) and that once the presumption becomes operative, the burden of persuasion shifts to the party seeking a separate property 'carve out.' . . . [Husband] failed to meet his burden of producing a sufficient amount of admissible evidence to permit a separate property 'carve out' from a community asset. Based on the above, anything other than the court's ruling that all of the options are community property would be an improper application of the law."[6]

The statement of decision also explained the division of the remaining items of community property, the awards of spousal support, child support, and attorney's fees to Wife. After entry of judgment, Husband filed notice of appeal.

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[6] The judgment also provided: "Because [Husband's] employer does not permit [Wife's] one-half share of the community stock options to be transferred into her name, they must remain in the name of [Husband]. Pursuant to stipulation, [Husband], and if possible, his employer, shall be subject to instruction from [Wife] to [Husband] to exercise the options at her direction, provided same is in accordance with all applicable laws, regulations, and company policy; she shall also be entitled to obtain the benefit of any preferential financing available to employees of Disney to exercise the stock options, provided there is no cost to [Husband] . . . ."

DISCUSSION

A. Stock Options.

The trial court found all of the stock options to be community property and divided them equally between the spouses. Because it was undisputed that some of the stocks offered in the options vested after the date of separation, Husband contends that it was mandatory for the trial court to apportion the asset between community and separate property, as some portion of the options vesting after separation were his separate estate. He contends that Disney's intent in granting the options was not determinative; rather the practical effect of the vesting schedule itself is determinative of the issue of the extent of the separate and community property interests in the options.

"[E]ach spouse's time, skill, and labor are community assets, and whatever each spouse earns from them during marriage is community property. [Citation.] After separation earnings and accumulations of a spouse are separate property. [Citation.] Fringe benefits are not a gift from the employer but are earned by the employee as part of the compensation for services. [Citation.] Thus fringe benefits such as . . . employee stock options are community property to the extent they are earned by the time, skill and effort of a spouse during marriage. [Citations.] Fringe benefits consisting of contractual rights to future benefits after separation, though unvested and unmatured, are property subject to allocation between community and separate interests at the time of dissolution. [Citation.] While the 'time rule' is the method most frequently used in allocating benefits earned in part during marriage [citation] the time rule is appropriate only where the amount of benefits is substantially related to the number of years of employment." (*In re Marriage of Harrison* (1986) 179 Cal.App.3d 1216, 1226; internal quotation marks omitted.)

An employee stock option grant is thus "'not an expectancy but a chose in action, a form of property . . .' susceptible of division in spite of being contingent or not having vested." (*In re Marriage of Nelson* (1986) 177 Cal.App.3d 150, 154.) With respect to retirement benefits, the court in *In re Marriage of Lehman* (1998) 18 Cal.4th 169, stated: "Once [a spouse] has accrued a right to retirement benefits, at least in part, during marriage before separation, the retirement benefits themselves are stamped a community asset from then on." (*Id*., at p. 183.)

"[*In re Marriage of Hug* (1984) 154 Cal.App.3d 780] explains there may be a number of factors which prompt companies to offer stock options including but not limited to attracting and retaining qualified personnel in addition to compensating employees for both past and future services. (*Id*., at pp. 785-787.) The characterization of a stock option as compensation for past or future services or both turns on the circumstances involved in the granting of that particular option. (*Id*., at p. 786.)" (*In re Marriage of Harrison, supra*, 179 Cal.App.3d at pp. 1226-1227.)

As stated in *Hug*, "[a]t the most general level, employment benefits such as stock options may be classified as an alternative to fixed salaries to secure optimal tax treatment. [Citation.] In this sense, stock options fall into the same category as, for example, fringe benefits, health and welfare benefits, incentive compensation based on company profits, deferred compensation plans, and pension and profit-sharing arrangements." (154 Cal.App.3d 780, 785; fn. omitted.)

"[N]o single rule or formula is applicable to every dissolution case involving employee stock options. Trial courts should be vested with broad discretion to fashion approaches which will achieve the most equitable results under the facts of each case." (*In re Marriage of Hug, supra*, 154 Cal.App.3d 780, 792.) Although the trial court has broad discretion in the matter, "the superior court must arrive at a result that is 'reasonable and fairly representative of the relative contributions of the community and separate estates.'" (*In re Marriage of Lehman, supra*, 18 Cal.4th 169, 187.)

As stated in the 1990 Plan, its purposes were "to provide long-term incentives and rewards to employees." The term "rewards" can reasonably be construed to mean compensation for past services. The trial court thus reasonably concluded that since the options were granted during marriage and before separation, all or at least a portion of the asset was community property. The trial court was also correct in concluding, on the instant record, that there was no way it could have apportioned the stock options between community and separate estates without speculating entirely as to how that division should be made. There was absolutely no evidence offered as to the considerations involved in the granting of the stock options to Husband.

Husband assumes, without citation to any evidence, that the options vesting after separation of the parties were also "earned" after separation, and thus separate property. However, without any evidence as to the circumstances involved in the granting of the stock options, the trial court reasonably could have concluded that at least to some extent, the contractual benefits were in the nature of rewards for past performance, and thus "earned" at the time they were awarded and acquired by Husband in 1995 and 1996. There is a general presumption that "property acquired during marriage by either husband or wife or both while domiciled in California is community property, except as otherwise provided by statute." (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 291.)

We also find to be without merit Husband's claim that the trial court improperly placed upon him the burden of establishing the existence and extent of a separate property interest in the options. Husband cites no authority establishing that the trial court abused its discretion in placing upon him the burden of producing evidence as to the existence and extent of any separate property interest in the options. In any event, Husband fails to establish that the record does not contain sufficient evidence to support the trial court's ruling as to the stock options.

Husband also contends that the trial court erred in excluding his proffered evidence on the issue of Disney's intent in awarding the stock options. With respect to the Eisner letters, Husband fails to establish any error or prejudice in the court's refusal to

admit them as to the issue of the intent or purpose of Disney. Eisner clearly was not part of the compensation committee which made the decision to grant the options to Husband. With respect to statements made to Husband by his supervisors Ms. Meserole and Mr. Cook in conveying the options, the trial court correctly determined that any such statements were hearsay and did not fall within any exception to the hearsay rule. Since there was no evidence that Eisner, Meserole or Cook were on the compensation committee, or had authority to act for or bind Disney with respect to the grant of the options, their intent and conduct is simply irrelevant and hence there was no foundation to admit their statements as evidence of Disney's intent or conduct. Husband's reliance on Evidence Codes sections 1241 and 1250 is misplaced.[7]

Without merit also is Husband's argument that the court erred in failing to admit the Eisner letters as contractual documents or under Evidence Code section 1330, pertaining to statements contained in a deed of conveyance or will.[8] The Eisner letters themselves clearly state that the stock options were governed by formal documents

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[7] Evidence Code section 1241 states: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and [¶] (b) Was made while the declarant was engaged in such conduct."

Evidence Code section 1250 deals, inter alia, with statements of a declarant's then existing state of mind, including a statement of intent. Evidence of such a statement is not made inadmissible by the hearsay rule when: "(1) The evidence is offered to prove the declarant's state of mind . . . when it is itself an issue in the action; or (2) The evidence is offered to prove or explain acts or conduct of the declarant." (Evid. Code, § 1250, subd. (a).)

[8] Evidence Code section 1330 deals with evidence of statements in a deed of conveyance or will or other writing affecting an interest in real or personal property. Such statements are not inadmissible by the hearsay rule if: "(a) The matter stated was relevant to the purpose of the writing; (b) The matter stated would be relevant to an issue as to an interest in the property; and (c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement." (Evid. Code, § 1330.)

including the 1990 Plan and Rules. Husband offered into evidence only a portion of the 1990 Plan, and that portion stated that the purposes of the plan were to provide incentives and rewards. Even were we to deem the Eisner letters to be admissible, Husband still fails to establish any prejudicial error because it is clear that the trial court gave more weight to the 1990 Plan document than to the Eisner transmittal letters as to the issue of Disney's purpose or intent in awarding him the options.[9] The letters still would not have provided sufficient evidence as to the specific circumstances of the grants so as to permit the trial court to apportion them between "incentives," to induce future performance, and "rewards," as compensation for past performance. Husband fails to establish that the exclusion of the Eisner letters on the issue of Disney's intent was prejudicial.

Finally, we reject Husband's claim the trial court erred in failing to give credence to Widman's testimony; the credibility of the witnesses, and the inferences to be drawn from their testimony, is generally within the province of the trier of fact. Moreover, it is clear from the statement of decision that the trial court did not disregard or fail to give credence to Widman's testimony; rather, the trial court found that Widman's admitted lack of knowledge about the specific circumstances as to the grant of the options to Husband convinced the trial court to assign Widman's testimony little weight and reasonably induced the trial court to refuse to make any inferences therefrom favorable to Husband. Under the instant circumstances, Husband fails to establish the trial court abused its discretion in its disposition of the stock options.[10]

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[9] The trial court refused to admit as evidence of Disney's intent or purpose those parts of the letters stating: "The granting of this stock option is in recognition of the important role you will play in assuring the future success of the Company," and "This stock option provides you a stake in the Company's future. Your initiative and efforts on the Company's behalf will play an important role in determining the extent of its future success and, therefore, the value of this option." The trial court reasonably could have concluded that the language was so general and ambiguous as to reflect as much on Husband's past performance as the desire to create an incentive for future performance.

[10] Husband also claims that the language of the judgment is ambiguous as it purports to grant to Wife a community interest in stock options granted after separation and up to

B. Further Spousal and Child Support Based on Husband's Annual Bonus.

Husband challenges the further spousal and child support award, which together comprised 50 percent of his annual bonus, on the grounds (1) the percentages awarded were excessive, (2) the child support deviated from the guideline child support formula without explanation or justification and (3) the court failed to set a cap or maximum to avoid an order that exceeds the children's needs.

Wife contends that, despite the fact the she argued below that Husband's bonus should be added to his base salary and that a percentage-of-bonus formula was inappropriate for calculating additional support, Husband repeatedly requested the trial court to apply such a percentage formula with respect to his annual bonus; by inviting the error, Husband has thus waived the issue for appeal.

The judgment orders Husband to pay "fixed" monthly child support of $2,576, plus additional child support in the amount of 23.4 percent (11.7 percent per child) of the gross amount of any bonus within 10 days of receipt of the bonus. In its statement of decision, the trial court stated that in computing support "the court accepted [Husband's] argument and used his monthly base pay for 1999 ($13,708), and added thereto the sum of $500 per month of expense reimbursement for a total income to [Husband] available for support of $14,208 per month."[11] The court also considered Wife's income to be

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the time of entry of the judgment. This appears to be a wholly hypothetical or academic issue, as there is no evidence that Husband was granted any stock options between the time of separation and the time of the judgment. The judgment itself states that Husband "has represented that he has been granted no other stock, stock options, or other benefits not clearly disclosed in writing." In light of the latter language, the judgment is not ambiguous.

[11] It is clear from our record (Reporter's Transcript, page 1820), that at the time it orally issued its decision, the trial court had before it a DissoMaster printout calculating the guideline amount of child support based on Husband's monthly income of $14,208.

$30,000 per year, and that Husband's child custody or time-share was twelve percent. Based on the above factors, the court ordered Husband to pay child support of $2576 per month. The statement of decision further stated: "At the request of [Husband], the court will make an order for further child support in the form of a percentage payment of [Husband's] bonuses paid during the year. Such an order is based on *In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33. [Husband] has argued that the particular *Ostler & Smith* calculation, as reflected in the order filed January 6, 2000, is incorrect; the court is not persuaded. The court finds that the order was drafted by [Husband's] counsel, and [he] has done nothing for over six months to change any perceived errors in the order, even though he would have become aware of them, at the latest, in mid-January 2000. . . . [¶] . . .[Husband] has tried to argue that the percentages in the January 6, 2000, order are inappropriate based on *In re Marriage of Schulze* (1997) 60 Cal.App.4th 519. Again, there is no admissible evidence to properly make the analysis [Husband] seeks to make to show that he is required to pay 87 percent of his bonus [after consideration of taxes]. . . . [Husband] is not legally qualified as an expert to do either a legal analysis of such cases, or a financial analysis of the taxes . . . ."

The statement of decision stated that Wife stipulated that if the court were to make such a percentage-of-bonus order, she would agree to the percentages existing in the January 6, 2000, order, i.e., 11.7 percent per child.

The statement of decision also expressly acknowledged that "such an award results in a deviation from the Guidelines; one basis for making such a deviation is that the order is made at the request of [Husband] and pursuant to [Wife's] qualified stipulation. The court makes this order, and related findings, notwithstanding [Wife's] general argument that an *Ostler & Smith* order is not really appropriate in this case inasmuch as [Husband] receives a relatively constant amount as his annual bonus and it is received in January of each year."[12]

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[12] For fiscal year 1998, Husband's bonus was $35,000; he testified that he had a track record of bonuses in the range from $35,000 to $40,000.

With respect to spousal support, the statement of decision analyzed the factors in Family Code section 4320, and concluded that Husband was to pay $1,600 per month in "fixed" spousal support, plus, as additional spousal support, 26.6 percent of any gross bonus within 10 days of receipt.

We agree with Wife that Husband has waived on appeal the claims that the child support order violates the statutory fixed child-support formula and that the court erred in failing to set a maximum or cap on child support. It is abundantly clear on this record that Husband urged on the trial court the particular methodology of computing support by separating out his annual bonus from the calculations subject to the Dissomaster calculations, and by treating the bonus as a basis for additional support under *In re Marriage of Ostler & Smith* (hereinafter *Ostler & Smith*).[13] This methodology was clearly contemplated to result in a deviation from the support guidelines and would be inconsistent with the concept of a cap on child support. Having urged the trial court to follow a particular methodology as to determining support, he cannot now claim that methodology to be error.

As stated by the court in *Ostler & Smith*: "The record contains no request by Clyde to the trial court to consider the guidelines. If he had made such a request, the court would have been compelled under the Agnos Act to include the bonuses in Clyde's gross income before computing net income available for child support. Clyde's resistance to consideration of his bonuses in setting support no doubt influenced his decision to avoid the guidelines in the trial court. Now, on appeal he presents detailed computations to support his claim that the court abused its discretion in failing to follow the guidelines. We decline to consider an issue not raised by him in the trial court, and

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[13] During trial, Husband testified that he was asking the court that "if I receive my bonus, when I receive my bonus, that at that time, I pay the . . . court-ordered percentage to [Wife] for both spousal and for [child support]." He acknowledged that he was asking the court to make a "*Ostler & Smith* support order of some sort."

therefore reject his claim that the court erred by exceeding the . . . guidelines for child support." (223 Cal.App.3d 33, 52-53.)[14]

We conclude that Husband has not waived the issue as to whether the additional support awards were excessive under the *Ostler & Smith* methodology. Husband argues that the percentages of additional support were excessive because they resulted in an award (child and spousal support together) of 50 percent of his bonus. He argues that the fixed amounts of support ($2,576 and $1,600) total $4,176, or about 29.4 percent of his income and queries, "If 29.4 percent is the correct figure to apply to his paychecks, how could 50 percent be the right figure to apply to his bonus?"

In *Ostler & Smith*, involving a 21 year marriage, the court affirmed an order providing for additional spousal support of 15 percent of the husband's annual gross cash bonus and additional child support of 10 percent of the gross bonus per child, where there were two minor children, resulting in additional support of 35 percent of the gross bonus. In that case, at the time of the hearing in 1988, the husband's annual salary was $165,000, with a monthly net income, excluding bonuses, of $10,686 per month; his annual bonus was $135,000; he was ordered to pay total fixed child and spousal support of $5,900 per month, plus additional support, as explained above, totaling 35 percent of his gross bonus. The husband there made similar challenges to the awards of child and spousal support based on his bonus as made by appellant herein. Under these facts, among others, the court in *Ostler & Smith* rejected the husband's claims that the support awards constituted abuses of discretion.

For similar reasons, and because Husband fails to cite any pertinent authority, we conclude that Husband here fails to establish the trial court's selection of the percentage amounts for the additional child and spousal support constituted any abuse of discretion.

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[14] The instant circumstances are distinguishable from a case cited by Husband, *In re Marriage of Hall* (2000) 81 Cal.App.4th 313. *Hall* is inapposite here.

Citing *In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, Husband contends that the failure of the court to set a cap on the additional support would cause Wife and the children to receive an unjustified windfall that would also exceed the needs of the children. Not only is *Kerr* factually distinguishable, but it does not support Husband's claim that child support is limited to the needs of the children. *Kerr* involved the issue of post-dissolution of marriage support of a vice president of Qualcomm; part of his compensation involved the future grant of stock options; in addition to a fixed support order based on the husband's salary and bonuses, the court ordered him to transfer to the wife 40 percent of the beneficial ownership in any future Qualcomm stock options he exercised until April 2003, when the 40 percent award would be reduced to 25 percent. The award of 40 percent included a 15 percent award for additional child support. Although the court noted that the parties valued the Qualcomm stock at $39 per share when they divided their property, the value of the stock had since increased by more than 20 fold. In reversing the percentage award of support, the court acknowledged that there was ample evidence of the wife's needs and earnings to justify an award of additional support; however, here "due to the enormous increase in value of Qualcomm stock and consequently Richard's stock options, the court's percentage support order will far exceed the parties' standard of living, even considering their investment and reinvestment history, during or at the end of their marriage." (77 Cal.App.4th 87, 95.)

With respect to the issue of child support in *Kerr*, the court reversed the order because it clearly found without basis the trial court's conclusion that the guideline amount of child support, without the option income, was insufficient to meet the family's former standard of living. The court noted that one exception to the guideline formula under Family Code section 4057, subdivision (b)(3), involves the situation when the supporting parent has such extraordinarily high income that the guideline amount would exceed the child's needs; in this case, "[a]pplying the guideline formula under these circumstances is inappropriate without a finding that the amount ordered would not exceed the [child's] needs. . . . [¶] On remand, the court must determine the children's

needs in light of both parents' abilities and standards of living. [Citation.] Given the court's broad discretion in ordering child support [citation], a percentage award based on the realized income from the exercise of stock options would be permissible, as long as the court sets a maximum amount that would not exceed the children's needs." (77 Cal.App.4th 87, 97.) Accordingly, the reference by the court in *Kerr* to the children's "needs" is clearly intended to refer to the "parents' current station in life," as "child support awards must reflect a minor child's right to be maintained in a lifestyle and condition consonant with his or her parents' position in society after dissolution of the marriage." (77 Cal.App.4th 87, 95-96.)

Kerr is distinguishable from the instant case. Here, the trial court made an express finding in its statement of decision that the standard of living established during the marriage was $11,500 per month, net of taxes, for two adults and two young children, and that "even with the support orders herein made, [Wife] will not be able to meet the marital standard of $11,500 per month (net of taxes)." Moreover, there is no indication here that this case is like *Kerr* in falling within the exception set out in Family Code section 4057, subdivision (b)(3).

For all of the foregoing reasons, we conclude that Husband fails to establish the award of additional support was excessive or that there was any error or abuse of discretion with respect to the awards of additional spousal and child support.

C. Reimbursement for Wife's Post-Separation Use of Community Funds.

The statement of decision found that after separation, Wife took a total of $16,218.32 from a community property bank account, for which it intended to charge her. We infer from our record that the court found that Wife's use of these funds was not in lieu of support and that she was required to reimburse the community for her use of these funds. We agree with Husband that the mathematical computation by which the trial

court purported to accomplish this reimbursement does not in fact accomplish this goal. In other words, the conclusion is inconsistent with the factual findings.

According to the statement of decision, at the date of separation, the parties had community bank account balances, less debts, of $62,924.79; Wife took $16,218.32, for which she was to reimburse the community. However, to accomplish this result, the statement of decision provided that "$16,218.32 shall be deducted from $62,924.79. [Husband] shall pay to [Wife] one-half the remaining difference of $46,706.47, or a total of $23,353.24."

Wife argues that the money she withdrew was in the nature of support and therefore should not reduce her share of the remainder of community funds. However, the trial court impliedly found that the approximately $16,000 was not used for support or for any community purpose; had it found as urged by Wife, the trial court would not have stated that it was charging Wife, and the purported mathematical exercise would have been completely unnecessary. The record here clearly indicates that the trial court intended to charge Wife and reimburse the community for the $16,000; instead, the court charged the community. Under the instant judgment, Husband was awarded $23,353.23; Wife was awarded $39,571.56 ($23,353.24 plus the previous withdrawals of $16,218.32).

As argued correctly by Husband, the methodology of the trial court results in an unequal division of community property and does not accomplish any reimbursement to the community. If the community were to be reimbursed, as determined by the trial court, Husband should be entitled to one-half of the account balance at separation, or $31,462.39.

We agree with Husband that the trial court should have awarded him $31,462.39 (one-half of the total community account balance, before Wife's improper withdrawals) and Wife should have been awarded $15,244.08. The judgment should be modified to reflect these amounts.

D. Reimbursement to Husband for Post-Separation Mortgage Payments.

Husband contends that the court erred in failing to reimburse him for mortgage payments made between the date of the parties' separation in June 1998 and the end of August 1999. During that time period, Wife and the children had exclusive use and possession of the family residence; he gave Wife $1,550 per week from his post-separation earnings; she used the funds to pay the mortgage and other bills. The mortgage payment was $3,332 per month.

Husband argues that during this time period his payments to Wife were approximately $6,727 per month whereas the temporary child and spousal support ordered by the court in December 1999 was $4,176 plus the percentage of the bonus, so that "[a]t the very least, the difference between what [he] paid and the amount of support ordered . . . should have been reimbursable."

The court in its statement of decision stated: "[Husband's] request for reimbursement of the post-separation mortgage payments and the real property taxes paid is denied. . . . With regard to the mortgage payments . . .there is not sufficient evidence to establish the separate property character of the funds used.[[15]] However, as to this part of his claim, even if he had established their separate property character, [Husband] has yet a further problem. By his own testimony, he put funds into an account for the agreed upon use by [Wife] to pay the mortgage, and otherwise use the funds for purposes which were clearly in the nature of support. *In re Marriage of Epstein* (1979) 24 Cal.3d 76 clearly holds that no reimbursement is proper in such a case."

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[15] Husband testified that he and Wife had an agreement at the time of separation that he would continue to deposit money into the parties' joint checking account at the Bank of America, and Wife would use that account to pay the mortgage and other household utilities. Wife argued at trial that when a joint account existed at date of separation and arguably separate property funds went into that account, the burden fell on Husband to establish that the community funds were "used up" or that otherwise it was the separate property funds that were paid out. Wife's counsel argued that "there wasn't any evidence of how [the account] was expensed, what happened to it, in a manner sufficiently precise to allow this court to make that ruling [on reimbursement]."

The court in *Epstein* acknowledged that "as a general rule, a spouse who, after separation of the parties, uses earnings or other separate funds to pay preexisting community obligations should be reimbursed therefor out of the community property upon dissolution. However, there are a number of situations in which reimbursement is inappropriate, so reimbursement should not be ordered automatically." (*In re Marriage of Epstein*, *supra*, 24 Cal.3d 76, 84; internal quotation marks omitted.) "[R]eimbursement should not be ordered where the payment on account of a preexisting community obligation constituted in reality a discharge of the paying spouse's duty to support the other spouse or a dependent child of the parties. Both spouses have a duty to support their dependent children." (*Id*., at p. 85; internal quotation marks omitted.)

"[S]pousal support is intended to meet the future living expenses of the supported spouse. Where payment of a continuing debt to a third party is related to such living expenses, it 'is clearly a form of spousal support. . . . [Citation.] For example, if the wife is living in the family residence and the husband is not, an order requiring the husband to pay all or part of the monthly mortgage is justifiable as spousal support because it meets the wife's need for housing." (*In re Marriage of Garcia* (1990) 224 Cal.App.3d 885, 892.) Moreover, an order for payment of a continuing debt as a form of temporary spousal support may serve to guarantee that a community asset will be preserved pending trial. (*Ibid*.) "In directing husband to fulfill his spousal support duty by making payments directly to the mortgage holder, the court assured that the mortgage would be paid, that the home would not be lost to foreclosure before the proceedings had concluded, and that the parties' credit standing would not be needlessly impaired. Supported spouses could not be expected to acquiesce in such orders if they are thereby exposed to a reimbursement claim like that asserted by husband. As wife points out, had she known that she would have been ordered to reimburse the community for her use of the family residence, she would have sought a support payment in cash and made the house payments herself." (*Id*., at p. 894.)

In the instant case, substantial evidence supports the trial court's finding that the money supplied by Husband for the mortgage payment was in reality a discharge of his obligation for spousal and child support; there is no evidence that Husband was providing support in any other form. "A second key consideration is whether the payment was in addition to reasonable support already being provided by the paying spouse, either pursuant to or in the absence of a court order. [Citation.] Because wife needed support, but husband was not providing it in any other form, the inference is compelling that the mortgage payments were intended as a form of support." (*In re Marriage of Garcia, supra*, 224 Cal.App.3d 885, 893.) Moreover, the statement of decision refers to the fact that the parties had an express agreement that Wife was to use funds provided by Husband to make the mortgage payment and pay other household bills; thus, the trial court impliedly relied upon the doctrine of estoppel to support its decision. (See *In re Marriage of Epstein*, *supra*, 24 Cal.3d 76, 86 [one issue crucial to issue of reimbursement is "whether husband should be estopped, as wife claims, from denying that his payments were in discharge of his duty to support"].)

The fact that Husband here may have been voluntarily paying more money for support immediately after the parties' separation than what was ordered by the court for temporary support in December 1999 is irrelevant; the parties had agreed to a certain arrangement for the period up to September 1999; moreover, the circumstances of Wife and the children were different when they were living in California (prior to September 1999) than after they had moved to New Jersey. Thus, the amount of temporary support awarded at the hearing in December 1999 is not determinative of the issue of whether Husband's providing of funds for the mortgage payments were in the nature of support.

Without merit are Husband's attacks on the statement of decision as inadequate to set out the factual basis for the court's refusal to order reimbursement for the mortgage payments. The factual findings in the statement of decision are clear and unambiguous and support the ruling on the issue of reimbursement.

E. Appearance of Bias.

Our reading of the instant record reveals that Husband's claims of hostility and belligerence on the part of the trial judge are entirely without merit. Rather, the only reasonable reading of the instant record is that the trial judge was patient, courteous, and fair in his handling of this trial. Husband complains that the court "repeatedly and erroneously rejected [his] evidence (and argument) as hearsay." While it is true that Wife's counsel, in his zealous representation of his client, made many objections to the evidence offered by Husband, requiring the trial court to make rulings on those objections, Husband has not established that any of the trial court's evidentiary rulings were erroneous. Also without merit are Husband's claims that the statement of decision contains unnecessary and gratuitous language that attacks him or which places him in a bad light; he simply disagrees with the factual findings therein. We conclude that there is no appearance of bias on the part of the court.[16]

[16] In the portion of his brief seeking reversal based on the alleged appearance of bias on the part of the trial judge, Husband, for the first time, claims the court made numerous other errors, which are allegedly evidence of bias. Husband claims the court erred in determining the date of separation, in including some employer expense reimbursements in his income, and in failing to reimburse him for taxes paid with respect to the family residence. As husband supplies no authorities to support these new claims of error, and appears to offer these claims only as further argument to support his claim of bias, we deem these new points to be waived.

DISPOSITION

That part of the judgment dealing with the division of community property, in paragraph 11 C. (1), is modified by deleting the last two sentences and adding the following: "Therefore, respondent [Husband] shall be entitled to $31,462.39, and petitioner shall be entitled to the remaining amount of $15,244.08." As so modified, the judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LILLIE, P.J.

We concur:

WOODS, J.

PERLUSS, J.